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In The Supreme Court of the United States

October Term, 1984

VITO MIRABILE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

A. Whether the trial court's denial of VITO MIRABILE'S motion for severance after the court permitted co-defendant Levine to discharge his counsel mid-trial and conduct his own defense in a manner which was irreconcilable and mutually exclusive with that of Mirabile, denied petitioner a fair trial.

B. Whether the introduction of evidence comprising uncharged criminal acts, absent relevancy, and absent a balancing test as required under the similar acts doctrine, deprived VITO MIRABILE of a fair trial under the Fifth and Sixth Amendments of the United States Constitution.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were petitioner VITO MIRABILE as well as a co-defendant Joel Levine and the United States of America as represented by the United States Attorney's office for the Eastern District of New York.

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OPINIONS BELOW

A judgment of conviction was entered in the United States District Court for the Eastern District of New York on December 2, 1983. Petitioner appealed that decision and the United States Court of Appeals for the Second Circuit affirmed in a detailed Order dated the 19th day of July, 1984. That Order does not constitute a formal opinion of the court and it is not reported, a copy is annexed hereto at page 1a of the Appendix A.

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on July 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 20.1 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution.

The Sixth Amendment to the United States Constitution.

The Fourteenth Amendment to the United States Constitution.

Title 21, United States Code, §841(A)(1).

Title 21, United States Code, §846.

The pertinent text of the foregoing provisions is set forth in Appendix B at page 6a.

PRELIMINARY STATEMENT

Petitioner, VITO MIRABILE, was convicted on October 18, 1983 after a jury trial on the charge of Conspiracy to Distribute Schedule I and Schedule II Narcotic Drug Controlled Substances in violation of section 841(A)(1) of Title 21 United States Code. On December 2, 1983, a judgment of conviction was entered in petitioner's case in the United States District Court for the Eastern District of New York sentencing him to a term of imprisonment for a period of nine (9) years and fining him Five Thousand ($5,000.00) Dollars. Thereafter, petitioner timely filed an appeal to the United States Court of Appeals for the Second Circuit which, after argument, was denied by an Order dated July 19, 1984. Petitioner VITO MIRABILE, is currently incarcerated.

A petition for rehearing containing a suggestion that the action be reheard *en banc* was filed by counsel for co-defendant Joel Levine, said petition was denied by the Court of Appeals on September 7, 1984. A copy of the unreported opinion is annexed hereto in Appendix A at page 4a.

STATEMENT OF FACTS

INTRODUCTION

The case at bar began as a traditional Drug Enforcement Administration (hereinafter DEA) buy operation. An informant named William Wright a/k/a "Victor" offered to purchase heroin in return for assistance by DEA with his probation violation that was pending and for remuneration. Victor had an even less saluatory background than the usual run of the mill informant. The agents were on notice that Victor had been trafficking in narcotics, while acting as a cooperating informant, an act generally frowned on by the Government. Nonetheless, the DEA chose to proceed with Victor, as if he were reliable.

Victor contacted Vito Mirabile, the petitioner, and Joel Levine and conducted negotiations for an ounce of heroin. The negotiations were somewhat unusual for these sort of transactions because the defendants insisted that the money be paid in advance (fronted). The tape recorded telephone conversations also revealed that Mirabile was owed money by Victor. Ultimately, the appellants were given nine thousand ($9,000.00) dollars, for which the defendants refused to provide any heroin. The Government was unable to produce any evidence that the defendants ever possessed heroin throughout the entire trial or that they ever truly intended to deal in heroin with the informant.

The Government was charged with proving a narrow and discreate conspiracy, the indictment charged that between the first day of June, 1983 and the eighth day of July, 1983 the defendants, Vito Mirabile and Joel Levine, conspired solely with each other to deal in cocaine and heroin. The prosecution, at the beginning of trial, specified there were no other co-conspirators (50).[1] The center of the proof was to be the negotiations by the informant Victor with Mirabile and Levine for heroin during the indictment period. Although Victor paid nine thousand ($9,000.00) dollars in Government funds to Mirabile and Levine they thereafter steadfastly refused to deliver any controlled substances. There followed a series of stalls, that the agents knew to be untrue. Eventually, Joel Levine told the informant that they would not provide any heroin (337). A careful search of the Levine's apartment failed to disclose any trace of heroin.

Defense counsel for petitioner, Vito Mirabile, argued that, Vito Mirabile had indeed discussed drugs with the informant, but only to collect money owed by the informant and pointed to the fact that Vito Mirabile and Joel Levine had refused to deliver heroin after being paid.

To bolster an extremely weak case, the Government introduced, over objection, documents which it claimed showed drug dealing with persons other than Victor. However, since the Government had specified that the only co-conspirators were Mirabile and Levine (Victor, acting as an informant, could not have the requisite intent), introducing these documents as records of the conspiracy was clearly improper and prejudicial. Moreover, the prosecution was aware that the records predated the con-

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1. Numerical references are to the transcript unless otherwise indicated.

spiracy charged and that no conspiracy could have existed between the defendants at the time the records were created.[2]

It was clear, therefore, that assuming *arguendo* the records reflected earlier drug dealing by Mirabile, it was improper to allow these records to be admitted to prove a conspiracy between Mirabile and Levine. This was highlighted by the charge given by the court, based on the representations by the Government, that since only two persons were charged with conspiracy the jury must find them both guilty or innocent. The records on which the Government sought to bootstrap its case reflected the names of what would have to be other co-conspirators, despite the particularization at the beginning of the trial of the indictment by the Government that there were no other co-conspirators.[2]

The final bizarre step in what had become a bizarre case occurred when Levine, although advised by the court that he must in essence sink or swim with his co-defendant Mirabile (653), chose to fire his attorney mid-trial and conducted his own defense pro se (673), with the intent to prove Mirabile guilty and himself innocent, a legal impossibility.

Levine had retained "thoroughly competent counsel" (762) who found Levine's proposed defense to be utterly repugnant to any practicing criminal litigator (670). Levine's defense was so glaringly inept that the trial judge remarked, "He's simply burying himself." (693) The

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2. The Government was aware that Levine was in jail on unrelated charges until April 23, 1983.

**It should be noted that Victor's name was not reflected in any of these records, and the records were stored with other discarded records in a knotted bag.

court later chastised Levine for having ". . . already fouled up this trial to a fare-thee-well." (764)

THE TRIAL

Special Agent Emilio Garcia was the first witness for the Government. Agent Garcia testified that the investigation had continued for a period of five (5) weeks, from approximately June 1, 1983 until the arrest of Vito Mirabile and Joel Levine on July 8, 1983 (119). The testimony showed that Garcia instructed the Government informant (a convicted drug trafficker) (122, 707) to place a call to Levine's apartment on June 2, 1983 (122). Garcia related the contents of the conversation between the informant and Vito Mirabile, the subject of which was Victor's attempt to purchase an ounce of heroin from the defendant (125). A tape recording of this conversation was subsequently played for the court (133). In this first conversation Mirabile made it clear that he wanted Victor to pay him in advance instead of the usual hand-to-hand exchange (137-139). This theme was recurrent throughout many of the tape recorded conversations (158-159, 178, 200-201).

In the second conversation, Mirabile's purposes became clear as he pushed Victor to return the Four Thousand ($4,000.00) Dollars Victor owed him (158-159). The conversation is completely directed toward getting Victor to advance funds to Mirabile. Even the manner of the transaction should have been suspect to the DEA, "fronting" the money requires special authorization from DEA Headquarters (355-363, 462-463).

On June 22nd, a call was placed to Levine's apartment (174). Victor and Levine attempted to arrange a meeting for the transfer. Levine asked for Nine Thousand

($9,000.00) Dollars for the heroin (178), and agreed to meet Victor at Lenny's Clam Bar at Cross Bay Boulevard and 161st Street in Queens at 7:00 P.M., that night (179). Garcia and other members of his surveillance team arrived to observe the meeting (192). Although Victor was fitted with a recording device, the conversation was not recorded because the tape ran out before Levine arrived (195). Levine drove in front of the restaurant and met with Victor and, upon learning that Victor would not front the money, refused to go forward with the transaction (450-452, 463). On the following day, (June 23, 1983) a telephone call was placed to Vito Mirabile's residence (196) and Victor discussed the previous evenings activities with Mirabile (200-203). Mirabile told Victor that Mirabile and Levine would have to receive the money before any heroin would change hands (200-201, 451). They agreed to meet again that night at Lenny's Clam Bar (206). On June 23rd, Victor received Nine Thousand ($9,000.00) Dollars in official Government funds from Special Agent Henry Baker and gave it to Vito Mirabile at 8:00 o'clock P.M., in the parking lot of the restaurant (436). However, Vito Mirabile did not supply Victor with any narcotics. He told Victor, ". . . give me an hour . . . I just gotta go and show them the money and get the thing and come back . . . You go home . . . I'll call you . . ." (213) As might have been expected, Mirabile did not call Victor in an hour. After receiving the money, Mirabile left with Levine in Levine's car (215). They were followed by Agent Garcia and other DEA agents (216) to Levine's apartment (217). Mirabile and Levine then left Levine's apartment and drove off in Levine's car, they stopped off at Mirabile's home for twenty minutes and then went to a bar for a brief time and left. Garcia thereafter terminated the surveillance (220). There was no evidence Mirabile had made any attempt to contact a supplier to honor his commitment.

The DEA, realizing that Mirabile was not trying to call or deliver the heroin, had Victor call Mirabile and leave a message with the answering service.

At approximately 11:00 P.M., on June 23rd, Vito Mirabile called the informant's apartment (438) and told Special Agent Baker, an undercover agent, who answered the phone that there would be no delivery that night, but that he (Mirabile) would call the next day (438-439, 454). Mirabile also told Baker that he (Mirabile) would deliver the heroin to Victor at 11:00 A.M., the following day (439). Surveillance was set up in the vicinity of informant's apartment, but neither Mirabile nor Levine appeared. Nor did Mirabile ever call, although Agent Baker waited until late into the evening of the next day (456).

Five days later on June 28, 1983, Victor spoke to Joel Levine on the telephone (224). Levine informed Victor that Vito Mirabile had been arrested in Buffalo on June 23rd. This statement was known to be a deception (325) since the agents had surveilled Mirabile until late in the evening of June 23rd and had seen evidence that he was at his home on the 24th. Victor had a further conversation with Joel Levine in order to set up a meeting to get the heroin. Levine told him to meet him at Lenny's Clam Bar on July 1, 1983. Surveillance agents were at the scene, but neither Mirabile nor Levine appeared (246) and no heroin was ever delivered. Subsequently, Victor was told by Levine that he would not receive any heroin.

On July 7, 1983, a warrant was obtained in order to search the premises at 63-11 Queens Boulevard, Apt. B8, Queens, N.Y., the residence of Joel Levine (247). On July 8, 1983, the agents searched Levine's apartment and arrested him (248). While searching Levine, Agent Garcia

recovered eight (8) $100 bills, which were part of the $9,000.00 that Victor had given to Vito Mirabile (249).

Various paraphenalia was found at the apartment and introduced at trial, although none of it was linked to heroin or to the charged conspiracy (260-287).

Admitted over the objection of counsel were several notebooks and documents (500-510). Agent John W. Featherly, over objection (514), testified that the books appeared to be of drug transactions. However, there was no evidence that linked any of these alleged drug transactions either to the informant or to Joel Levine, who was Vito Mirabile's only co-conspirator in this extremely narrow conspiracy (50). In addition, it was apparent that there was no indication any of the purported deals occurred during the time frame of the conspiracy in the case at bar.

Roger Godino, a chemist, testified that he analyzed Levine's vacuum cleaner bag and that the agents had vacuumed the entire apartment for traces, no evidence was found that heroin had ever been in the apartment (621), although he testified that traces of heroin are chemically stable, and would remain as long as traces of cocaine, which were found (627-628).

At the close of the Government's case, counsel for Joel Levine requested an *ex parte* in camera conversation with his client and the Court (650). Counsel maintained that he did not wish to put his client on the stand. Levine made it clear that he would seek to prove Mirabile guilty, and himself innocent, despite the fact that the jury would be told this was a legal impossibility.

DEFENDANT LEVINE: They can't find one of us not guilty and one guilty.

THE COURT: No, because there is a conspiracy count. You can't conspire with yourself.

DEFENDANT LEVINE: I feel my co-defendant is, in fact, guilty.

THE COURT: He's only guilty if he conspired with you. He's not guilty for distributing drugs because he's not charged with distributing drugs. He's only charged with conspiring with you to distribute drugs. I suggest to you that you take the weekend, think about it carefully, because, as you say, this is a very important decision for you to make and it is you that has to face the consequences if you are convicted. So you have to analyze it in terms of what your chances are, what your best chances are (651-653).

After the weekend, the trial judge initially refused to allow Levine to proceed pro se (670). Levine's counsel requested a competency hearing for Levine (671-672), since it was clear that Levine was still insisting on a suicidal course. A short time later, the Court allowed Levine to proceed pro se, but appointed his attorney to remain as a legal adviser (673).

Although he had been informed by the Court that if one defendant was convicted, both defendants would have to be convicted, Levine attempted to prove Vito Mirabile guilty. Levine's bizarre defense was conducted over objection by Mirabile's counsel and a motion by counsel to sever.

Levine, acting pro se, called the informant, Warren Wright, a/k/a Victor, to the stand as his witness (681). Levine elicited from Wright over objection, that Wright on previous occasions had purchased drugs from Mirabile

(704) and later Levine (696) in January and March of 1983 (710-713).[3] Wright, as anticipated by Levine's former counsel, was prepared to say anything to obtain a conviction. Thus, on cross-examination by appellant Mirabile's counsel, Wright testified that his receipt of heroin from Mirabile and Levine was in an undercover capacity monitored and controlled by Agent Garcia (712-714). Garcia, called by Mirabile's counsel, was forced to concede that Wright's testimony in this regard was a total fiction (735-736). It was also shown that Levine was not in New York between October of 1982 and April 23, 1983 (739) and that thereafter his face was bandaged until May 12, 1983 as a result of surgery, conflicting radically with Victor's testimony.

REASONS FOR GRANTING THE WRIT

SUMMARY

This case presents two questions which are of sufficient importance to require resolution by this Court. The first question is apparently one of first impression, the second is an often recurring problem in which the decisions of the lower courts herein are in conflict with the majority view. On both we submit the decision below is plainly incorrect.

A. The first question upon which there is apparently no federal appellate court guidance concerns what actions the trial court must take in order to preserve a defendant's right to a fair trial when a co-defendant is permitted to discharge his counsel and conduct his defense pro se.

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3. Most indicative of the damage that Levine was doing to himself and his co-defendant, Vito Mirabile, was the rousing defense at side bar by the prosecutor to permit Levine to be allowed to continue his destructive path (691-694).

B. The second question relates to the introduction of evidence of criminal conduct outside the scope of the crimes charged in the indictment. The trial court here permitted such evidence to be introduced without making the requisite balancing test of probative value against prejudicial effect. The Second Circuit in their decision below apparently abandoned its own well established rule and has adopted a standard that is in conflict with the remaining federal circuits.

ARGUMENT

POINT A

THE TRIAL COURT IMPROPERLY DENIED VITO MIRABILE'S MOTION FOR SEVERANCE AFTER THE COURT PERMITTED CO-DEFENDANT LEVINE TO DISCHARGE HIS COUNSEL AND CONDUCT HIS DEFENSE PRO SE IN A MANNER WHICH WAS IRRECONCILABLE WITH AND MUTUALLY EXCLUSIVE OF MIRABILE'S DEFENSE.

During the course of the trial, co-defendant JOEL LEVINE was permitted to discharge his counsel. Thereafter, Levine proceeded to interpose a defense that was based upon proving Vito Mirabile guilty and himself innocent, which under the circumstances of this case was a legal impossibility. It is submitted that the trial court improperly allowed co-defendant Levine to discharge his counsel and to conduct an incompetent defense, and that having done so the trial court thereafter improperly denied Vito Mirabile's motion for severance and mistrial.

At the end of the Government's case Joel Levine and his counsel asked to speak to the Court *ex parte.* Levine's

counsel indicated that Levine was pressuring him to present a defense that was predicated upon proving Mirabile guilty of the charges. The trial Judge pointed out to Levine that the Court would be charging the jury, that if one defendant were found guilty both defendants would have to be found guilty, since only a conspiracy between the two defendants was charged. Levine replied, "I feel my co-defendant is, in fact guilty" and as will be discussed infra, that he believed he could exculpate himself by proving that his co-defendant was guilty, a legal impossibility (650-653).

After a weekend recess, Levine, this time in open Court, demanded to represent himself and it was clear from the comments of his counsel that his defense would be based on proving the guilt of his co-defendant (667). Levine's counsel told the Court he had been practicing law for ten years and had vast experience as a criminal defense lawyer. He stated, "There is no way, shape or form that I could physically and with good conscience, put on a defense as is being suggested by my client . . . everything I have been taught, everything in my experience has shown me, prevents me from doing anything like that . . ." (670-671). When Levine again pressed to represent himself, his counsel requested that Levine be given a competency hearing, adding

> ". . . there is the possibility that the defendant (Levine) might be self-destructive or totally incompetent to prepare and aid in his own defense . . . at this juncture, Your Honor, based upon the information given to me, and that as an officer of this Court, I am stating my belief that Mr. Levine is no longer competent to aid in his defense and request that a mental examination be ordered by this Court." (672)

The trial Court instead permitted Levine to appear pro se, although the Court subsequently found Levine's counsel to be "thoroughly competent counsel" (762). During the remaining course of the trial the judge remarked, "He's (Levine) simply burying himself." (693) The Court later chastised Levine for having ". . . already fouled up this trial to a fare-thee-well." (764) Counsel for Mirabile, in full agreement with the Court at least to that extent, moved continually for a severance and mistrial (673, 674, 693, 871).

Rule 14 of the Federal Rules of Criminal Procedure, provides that the trial court may grant a severance whenever it appear that a defendant is prejudiced by a joinder of defendants.[4] In *DeLuna v. United States,* 308 F.2d 140, 154 (5th Cir., 1962) the Court of Appeals focused on a co-defendant's counsel's attempts to exculpate his client by repeatedly imputing the guilt of the appellant and on the collision of the attorneys for both defendants during the trial. The Court found the trial court should have granted a severance.

Similarly, in *United States v. Johnson,* 478 F.2d 1129 (5th Cir., 1973) conflicting and antagonistic defenses required the Court to grant a severance. There the co-defendant had incriminated the appellant. That appellate

4. Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the Government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the Court may order the attorney for the Government to deliver to the Court for inspection *in camera* any statements or confessions made by the defendants which the Government intends to introduce in evidence at the trial.

court citing *Schaeffer v. United States*, 362 U.S. 511 (1960) reaffirmed that "the trial Judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." *DeLuna* and *Johnson* were cited by the Second Circuit in *United States v. DiGiovanni*, 544 F.2d 642 (2d Cir., 1974) as examples of when a severance was required.

Where as here, the jury is called upon to believe the co-defendant guilty as part of a defense, however misguided, severance was mandated; *United States v. Carpentier*, 689 F.2d 21 (2d Cir., 1982) cert. denied 103 S.Ct. 735 quoting *United States v. Berkowitz*, 662 F.2d 1127, 1134 (5th Cir., 1981). See also *United States v. Crawford*, 581 F.2d 489 (5th Cir., 1978); *United States v. Ziperstein*, 601 F.2d 281 (7th Cir., 1979) cert. denied 444 U.S. 1031; *United States v. Kopituk*, 690 F.2d 1289 (11th Cir., 1982) cert. denied 103 S. Ct. 2089. Here, at the outset of the trial, counsel for Levine asserted that there might be antagonistic defenses (72-73) and later warned again (664). Levine, an erratic individual whose mental competency was called into question by his own retained counsel, was permitted to assume control of the trial after he made it clear he would seek to prove Mirabile guilty, which, based on the trial Court's proposed charge that if one were guilty they must both be guilty, was a suicidal act.[5]

The trial Court clearly had no obligation to discharge Levine's counsel, who the Court had found to be "thoroughly competent." (762). See *United States Ex Rel*

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5. This Circuit has long recognized that the events at a trial may make it impossible for a co-defendant to receive a fair trial, *United States v. Danzey*, 594 F.2d 905 (2d Cir., 1979) cert. denied 441 US 951 (1980); *United States v. Kelly*, 349 F.2d 720 (2d Cir., 1965).

Maldonado v. Denno, 348 F.2d 12 (2d Cir., 1965) and *United States v. Malizia,* 437 F.Supp. 952 (SDNY, 1977) aff'd 573 F.2d 1298 (2d Cir., 1978). In *Denno,* the Court of Appeals held that:

> "The right of a defendant in a criminal case to act as his own lawyer is unqualified if invoked prior to the start of the trial . . . once the trial has begun with the defendant represented by counsel, however, his right to discharge his lawyer is sharply curtailed. There must be a showing that the prejudice to the legitimate interest of the defendant overbalance the potential disruption of proceedings already in progress . . ."

The Court also declined to conduct a thorough hearing into the defendant's background as done by the trial Court in *Malizia.* See also *United States v. Sacco,* 563 F.2d 552 (2d. Cir., 1977) cert. denied 434 U.S. 1039, 98 S.Ct. 779 (1977), in which the Court of Appeals asserted that the defendant must realize that ". . . the Court will not countenance the deprivation of co-defendants' right to a fair trial.", at 557. In the case at bar, Levine was permitted to discharge his attorney mid-trial. As a result, Vito Mirabile did not have an opportunity to devise a strategy that could have possibly negated the harm caused by Levine. In addition, the trial Court was aware of Levine's inability to defend himself and the detriment suffered by the defendant, Vito Mirabile, due to Levine's actions. The Court failed to exercise its "continuing duty at all stages to grant a severance if prejudice does appear." *Schaeffer v. United States, supra,* at page 516; *United States v. Johnson, supra,* at 1132.

Levine called Warren Wright, the Government informant, to the stand. Levine began his examination by trying to show a relationship between the informant and Vito Mirabile (689) and then elicited testimony which im-

plicated Mirabile in uncharged and probably fictitious drug sales (691). Not unremarkably, the prosecutor argued vehemently against objections by counsel for Mirabile, assuming almost a co-counsel role with Levine (692). The prosecutor would thereafter capitalize on Levine's inept direct examination of the informant, by rounding out detail after detail regarding these alleged drug transactions (700-703). Remarkably, the informant would testify that all the purchases of drugs he had made from Mirabile were at the behest of the DEA (712), a complete fabrication (735-736). Nonetheless, the damage was done, but the Court refused to give any relief. This course of conduct was continually objected to by counsel for Mirabile:

> COUNSEL: . . . all this defendant is doing is burying himself in a very deep hole.
>
> THE COURT: I agree with you on that. He's simply burying himself.
>
> COUNSEL: I, however, have a right not to go into that hole with him. And I object strenuously to this whole line of questioning. We have a very limited conspiracy here which starts on June 1st and I believe that that is the only thing that is relevant in this case (693).

Levine to the very end persisted in his belief that he could be acquitted, and his co-defendant convicted in a conspiracy which only had two participants (751). The Court was indeed correct in saying to Levine that he had ". . . already fouled up this trial to a fare-thee-well." (764).

The question presented here far transcends in importance the facts of this case. It is submitted that both the bench and bar require the guidance of the Supreme Court in order to protect the due process right of a defendant when a co-defendant chooses to assert his right to represent himself as permitted by this Court's holding in *Faretta v. California,* 422 U.S. 806 (1975).

POINT B

THE COURT DEPRIVED VITO MIRABILE OF A FAIR TRIAL BY ALLOWING THE GOVERNMENT TO INTRODUCE EVIDENCE TENDING TO DEMONSTRATE HIS BAD CHARACTER.

As part of the Government's case in chief against the defendants, the Government offered evidence that Vito Mirabile possessed records of what was purported to be drug transactions (although no link was shown to the charged conspiracy), and that he had participated in drug transactions at a time outside the scope of the conspiracy. The effect of this testimony, introduced against Vito Mirabile, served no purpose other than to alert the jury that he was of a bad character and likely to have committed the crimes charged in the indictment. *United States v. O'Connor,* 580 F.2d 38, 40 (2d Cir. 1978). Such an inference is clearly impermissible. *Id.,* at 40. The Court permitted this evidence as proof of the conspiracy, although, as will be discussed infra, no connection was shown and the evidence was to the contrary. The Court also permitted the evidence to be introduced as a similar act, without making the requisite balancing test of the probative value against the prejudicial effect. It is submitted that the admission of this evidence requires reversal.

Such evidence is not presumed relevant nor is it automatically admissible. To be admissible, similar acts evidence must be shown to be relevant to an issue in dispute. *United States v. Levy,* Docket Nos. 83-1226, 83-1227 __ F2d __ (2d Cir., 1984) Slip Opinion decided January 31, 1984 at pg.__. In the instant case, evidence was admitted without a sufficient showing that it was relevant to any issue in dispute. Furthermore, it was introduced against the defendant despite the fact that under

normal circumstances it should not have been admitted on the Government's direct case. *United States v. Levy, supra.*

Clearly, the Govement had decided to attack Vito Mirabile's character since the balance of their case was insufficient to prove petitioners participation in the charged conspiracy. As in *United States v. O'Connor, supra,* at 43, the similar act evidence here distorted the emphasis of the trial from the crimes charged in the indictment. Consequently, petitioner's opportunity for a fair trial was impermissibly impaired. The conspiracy that Vito Mirabile and Joel Levine were charged in participating in was extremely narrow in scope and duration. The defendants were charged as the only members of a conspiracy, the purpose of which was to sell heroin to a Government informant (50). The above conspiracy was charged as spanning not more than five to six weeks in duration.

EVIDENCE OF AN ALLEGED PRIOR SALE

The Court improperly allowed testimony by Agent Garcia during the Government's direct case that he had been told by the informant that Vito Mirabile had had prior drug dealings with the informant.[6]

It is undisputed that there are limited circumstances when evidence of uncharged similar criminal acts may be introduced into evidence, *United States v. Levy, supra,* at page 1437; *United States v. Figueroa,* 618 F2d 934 (2d Cir., 1980); *United States v. Benedetto,* 571 F.2d 1246 (2d

6. The Court later compounded this error by permitting Joel Levine (acting as his own counsel) to question the informant, to the detriment of both defendants, about purported dealings with the defendants outside the time frame of the conspiracy.

Cir., 1978); *United States v. Lubelman,* 571 F.2d 1252 (2d Cir., 1978); *United States v. O'Connor, supra.*

The Second Circuit Court of Appeals in *United States v. Levy, supra,* recently reiterated the criteria for the permissible introduction of other acts. The Court stated that in order to be admissible other act evidence must first comply with Rule 404(b) of the Federal Rules of Evidence. *Levy,* at 1446. The evidence of other crimes or acts can not be introduced merely to demonstrate a defendant's propensity to commit the crime. Should the evidence in question satisfy the requirements of 404(b), there must then be a determination "whether the probative value of the evidence outweighs the prejudicial impact," as set down in Rule 403 of the Federal Rules of Evidence. *Levy,* at 1446. In *Levy,* the defendant was charged with distributing an ounce of heroin in violation of Title 21, United States Code, §841(a)(1). The Court there permitted the Government to introduce an uncharged "sample" transaction of heroin occurring six hours before the charged offense. *Levy,* at 1451. Although the Court of Appeals held that the introduction of the sample transaction would have been admissible to show a common scheme, Levy did not receive the mandatory cautionary jury instruction directing the jury to consider the sample transaction as evidence of a common scheme and not "as an indication of Levy's criminal propensity." *Levy,* at 1452.

In the instant case the prosecutor elicited from Agent Emilio Garcia that the informant was not instructed to ask for a sample of heroin because "they had done prior business before" (417). Defense counsel's objection and motion for a mistrial were denied. Such testimony brings before the jury evidence of prior uncharged criminality without the cautionary instruction to the jury as required by *Levy.* Moreover, this hearsay evidence from the infor-

mant was extremely questionable since the informant was a cooperating individual at the time of the alleged incident and apparently did not tell the agency he was still dealing in drugs. Later, the informant would testify to a complete lie that he was working for the DEA at that time and that the alleged previous buy was controlled (712-713).

Furthermore, even assuming arguendo that the alleged prior dealing was properly before the jury as evidence of intent on the part of the defendants to sell heroin to the Government informant, the Court committed reversible error by allowing the prosecutor to introduce this evidence in his opening and on his direct case.

The Court of Appeals, in *Figueroa, supra,* reversed a judgment of conviction on the grounds that the trial court improperly admitted evidence of a defendant's prior conviction. The Court held evidence must be relevant to a disputed issue of the trial. When the disputed issue is the intent of the defendant to commit an act, as is the case at bar, the Court ruled that:

> ". . . if the evidence is offered to prove the defendant's knowledge or intent, the offer of similar acts evidence should await the conclusion of the defendant's case and should be aimed at a specifically identified issue. This enables the trial judge to determine whether the issue sought to be proved by the evidence is really in dispute and, if so, to assess the probative worth of the evidence against its prejudicial effect." *Figueroa* at 939.

Failure to follow the aforementioned rule has resulted in reversals: *United States v. Mohel,* 604 F.2d 748 (1979); *United States v. Manafzadeh,* 592 F2d 81 (2d Cir., 1979); *United States v. O'Connor, supra.*

The Court's error in allowing Garcia's testimony of alleged prior dealings between the informant and Vito Mirabile is all the more glaring when it is considered that there was no indication that Agent Garcia had first-hand knowledge of the alleged prior drug transactions between the defendants and the informant. His testimony was therefore inadmissible as hearsay. The Government could only have properly introduced evidence of Mirabile's prior dealings after the defense had put on its case, and after the Court had had the opportunity to balance the probative value of the testimony against the prejudice that would be derived from it.

INTRODUCTION INTO EVIDENCE OF THE NOTEBOOKS

The Court allowed, over objection by defense counsel (273), the Government to introduce into evidence several notebooks recovered from Joel Levine's apartment (273). These notebooks were allegedly records of drug transactions compiled by Vito Mirabile. The Government failed to establish that these notebooks, in any way, related to the conspiracy as charged in the indictment and it is clear they pre-dated that conspiracy by many months. In fact, the notebooks were contained in a knotted plastic trash bag on the floor of a closet and did not appear to be in use at the time of the search. Since these notebooks were not evidence of the conspiracy with which the defendants were charged, they were therefore irrelevant and inadmissible. However, without showing the relevance or connection to the narrow conspiracy charged, the prosecution was permitted to have an agent testify that the notebooks were of substantial narcotics transactions.

There was no evidence presented that the books recorded any transactions between Vito Mirabile and

either Joel Levine or the Government informant. Therefore, this evidence is outside the scope of the conspiracy charged. Counsel was forced into a mini-trial regarding whether or not the appellant engaged in drug dealing at an earlier time. In light of the paucity of evidence against Mirabile it is clear that the admission of such evidence deprived petitioner of a fair trial. The admission of the notebooks, clearly established in the eyes of the jury, the defendant's bad character.

As the Second Circuit has stated in the recent and remarkably similar case of *United States v. Garcia-Duarte,* 718 F.2d 42 (2d Cir., 1983), ". . . more is needed than simply finding a record book of drug transactions for the book to qualify for admission under the Federal Rules of Evidence." In that case, it was clearly held that such record books are hearsay in nature. In this case, as in *Garcia-Duarte,* these books could not properly have been admitted under the "Records of regularly conducted activity" hearsay exception, Fed. R. Evid., Rule 803(6), because there was an insufficient foundation to satisfy the prerequisites of that exception. See *United States v. Terry,* 702 F.2d 299, 320 n. 22 (2d Cir. 1983); *United States v. McGrath,* 613 F.2d 361, 367-68 (2d Cir., 1979), cert. denied, 446 U.S. 967 (1980); *United States v. Baxter,* 492 F.2d 150, 164 (9th Cir., 1973), cert. denied 416 U.S. 940 (1974). The Government in this case established at best that the records were created by Vito Mirabile at some unknown time in the past, there was not even an attempt to connect the books to the conspiracy charged either in time or by reference to the persons whose names were noted in the book.

As previously noted in relation to both the notebooks and the testimony relating to alleged prior sales the Government did not, in any way, attempt to link such

evidence to the conspiracy charged. But rather they utilized such evidence to paint the defendants as criminals in a manner prohibited by *Benedetto* and *O'Connor, supra.*

The holding of *Garcia-Duarte* and its interpretation of the *Geany* rule, *United States v. Geany,* 417 F.2d 116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970), were clearly brought before the Court prior to the opening statements (66-71). The trial Court chose to ignore *Garcia-Duarte* and permitted the Government to open on the evidence, over objection, and a similar acts instruction was never utilized.

It is submitted by the petitioner that where as here the trial court as well as the Court of Appeals have ignored settled legal doctrine so as to create a conflict with the decisions of other Circuits, appeal to the Supreme Court by way of certiorari is both proper and indeed necessary.

CONCLUSION

For the reasons stated within, petitioner submits that a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted and that the judgment of the Court of Appeals should be reversed.

Dated: Brooklyn, New York
September 17, 1984

Respectfully submitted,

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APPENDIX A—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of July, one thousand nine hundred and eighty-four.

Present:

Hon. James L. Oakes,
Hon. Jon O. Newman,
Circuit Judges.
Hon. Jacob Mishler,
District Judge.

United States of America,

Appellee,

v.

Vito Mirabile and Joel Levine a.k.a Cohen,

Appellants.

No. 83-1446

ORDER

Vito Mirabile and Joel Levine appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York, Eugene H. Nickerson, *Judge.* A jury found the defendants guilty of conspir-

*Of the Eastern District of New York, sitting by designation.

ing to distribute heroin and cocaine in violation of 21 U.S.C. §846. On this appeal, the defendants raise numerous objections to various evidentiary rulings of the trial court. We find them to be without merit, and affirm.

The appellants' most significant challenge involves the introduction of three handwritten diaries, which were seized from Levine's room closet by DEA agents executing a search warrant. The diaries were written by Mirabile and contained records of heroin and cocaine transactions. The appellants contend that the district court erred in admitting the notebooks into evidence. Because the notebooks predate, and do not refer to, the conspiracy at issue here, their contention is that the notebooks are irrelevant. Even if they were relevant, they argue, the diaries were inadmissible hearsay. We do not find these arguments persuasive.

As the government correctly points out, the relevance of the notebooks does not turn on a determination that the transactions recorded therein were part of the charged conspiracy. Like guns, traces of drugs, scales, and other drug paraphenalia, the records were simply "tools of the trade" which tended to show that a conspiracy existed. The diaries were written by Mirabile and contained records of heroin and cocaine transactions, and thus tend to show that Mirabile had an intent and state of mind to participate in a narcotics conspiracy. *See United States v. Bermudez,* 526 F.2d 89, 96 (2d Cir. 1975), *cert. denied,* 425 U.S. 970 (1976). To the extent that the notebooks do not shed light on Levine's intent or state of mind, their admission was nonetheless harmless error.

We are equally unpersuaded by the appellants' hearsay objections. The diaries are not hearsay, because they are not offered to prove the truth of the statements con-

tained therein. Rather, like scales or other drug paraphernalia, the notebooks were offered as evidence from which the jury could infer that the defendants were involved in drug dealing.

The only other point made by appellants that is worthy of comment is that the jury was permitted to consider whether the defendants were guilty of a conspiracy involving a longer period of time and additional defendants than was charged by the grand jury. However, this misconceives the indictment which was broader than the one-ounce heroin transaction with the informant. There was no constructive amendment or impermissible variance since the evidence was proof of the broader distribution conspiracy charged in the indictment. *United States v. Heimann,* 705 F.2d 662 (2d Cir. 1983).

We have considered all of the appellants' other arguments and find them to be without merit. Accordingly, we affirm the judgments of the district court.

s/ James L. Oakes,
s/ Jon O. Newman
Circuit Judges.
s/ Jacob Mishler
District Judge.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the seventh day of September one thousand nine hundred and eighty-four.

UNITED STATES OF AMERICA,

Appellee

v.

VITO MIRABILE, JOEL IRA LEVINE, a/k/a "JOEL COHEN",

Defendants-Appellants.

No. 83-1446, 84-1006

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant-Defendant, Joel Ira Levine, a/k/a "Joel Cohen",

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX B—CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21 USC §*841. Prohibited acts A—Unlawful acts*

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 USC §*846. Attempt and conspiracy*

Any person who attempts or conspires to commit any offense defined in this subchapte is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

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Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

No. 84-432

In the Supreme Court of the United States

OCTOBER TERM, 1984

VITO MIRABILE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-432

VITO MIRABILE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied a fair trial by the allegedly antagonistic pro se defense presented by his co-defendant and by the admission of handwritten records and testimony about drug transactions other than those charged in the indictment.

1. Following a jury trial in the United States District Court for the Eastern District of New York, petitioner and co-defendant Joel Levine were convicted on one count of conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. 846. Petitioner was sentenced to nine years' imprisonment and fined $5,000. The court of appeals affirmed by unpublished judgment order (Pet. App. 1a-3a).

The pertinent facts are not in dispute. On June 2, 1983, petitioner and Levine were tape-recorded negotiating the sale of one ounce of heroin to a DEA informant. Petitioner and Levine demanded that the informant pay $9,000 in

advance of delivery of the heroin. The informant made the payment on June 23, 1983, but petitioner and Levine made excuses for delaying delivery of the heroin and had not made delivery at the time of their arrests. Petitioner's defense was that he never intended to deliver the heroin but intended instead to "rip off" the informant, who owed petitioner money. The government bolstered its contention that petitioner and Levine were in fact engaged in a genuine drug distribution conspiracy by introducing, inter alia, petitioner's handwritten diaries chronicling his prior drug trafficking activity (which were found in a search of Levine's apartment). The government also introduced evidence that weapons, traces of cocaine, and drug paraphernalia were found in a search of Levine's apartment, and that traces of cocaine were found in a search of petitioner's car.

In the midst of trial, Levine sought to discharge his appointed counsel and to proceed pro se thereafter. The district court cautioned against such a course and initially denied the request. But when Levine persisted in his request and it became clear that he and his counsel were at loggerheads as to the defense tactics to be employed, the district court allowed him to represent himself, with assigned counsel acting as standby counsel.

In his defense Levine called the informant as a witness and sought to prove the absence of a conspiracy between himself and petitioner and also that the transaction with the informant had been a "rip-off" rather than a drug sale. The informant's testimony actually tended to incriminate both petitioner and Levine. The court charged the jury that petitioner and Levine, as members of an alleged two-man conspiracy, could both be convicted or both acquitted, but that a split verdict was not possible.

2. Petitioner argues (Pet. 12-17) that Levine's pro se defense was so antagonistic to his own defense that the district court should have granted his mid-trial motion for

severance.[1] This claim does not withstand scrutiny. If a severance had been granted, the government could nevertheless have adduced the informant's testimony that incriminated petitioner at a separate trial of petitioner. See *United States* v. *Tombrello*, 666 F.2d 485, 492 (11th Cir.), cert. denied, 456 U.S. 994 (1982). Beyond this, the flaw in petitioner's argument is that the two defenses were not directly antagonistic. Both petitioner and Levine presented the "ripoff" defense. And to the extent that Levine tried to negate the conspiracy by excluding himself from any drug transaction, that defense had no tendency to incriminate petitioner *on the conspiracy offense charged.* Accordingly, the defenses of petitioner and Levine were not mutually exclusive and did not require a severance. See *United States* v. *DeSimone*, 660 F.2d 532, 540-542 (5th Cir. 1981), cert. denied, 455 U.S. 1027 (1982); *United States* v. *Grapp*, 653 F.2d 189, 193 (5th Cir. 1981). It is only when one co-defendant becomes "the government's best witness against the other" that clearly antagonistic defenses exist. *United States* v. *Crawford*, 581 F.2d 489, 492 (5th Cir. 1978). Here, petitioner has wholly failed to demonstrate the type of compelling prejudice that would warrant holding that the district court abused its discretion in denying the motion for severance. See *United States* v. *Thomas*, 676 F.2d 239, 243

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[1] In the circumstances of this case the court acted well within its discretion in allowing Levine to proceed pro se. *Faretta* v. *California*, 422 U.S. 806 (1975). See also *United States* v. *Sacco*, 563 F.2d 552, 556-557 (2d Cir. 1977), cert. denied, 434 U.S. 1039 (1978).

Petitioner contends (Pet. 11) that this case presents an issue of first impression concerning the district court's responsibility to prevent prejudice to a defendant when a co-defendant is permitted to proceed pro se. But he has not explained how the question presented concerning allegedly antagonistic defenses is altered by the pro se status of the co-defendant. We note that the court of appeals did not deem it necessary to address petitioner's antagonistic defenses contention in its judgment order. See Pet. App. 3a.

(7th Cir. 1980); *United States* v. *Berkowitz*, 662 F.2d 1127, 1132 (5th Cir. 1981); *United States* v. *Sellers*, 658 F.2d 230, 231 (4th Cir. 1981).

3. Petitioner also contends (Pet. 18-24) that the trial court erred in admitting testimony reflecting that the informant had prior drug dealings with petitioner, and by allowing introduction in evidence of handwritten records of drug transactions compiled by petitioner that were found in a search of Levine's apartment. Petitioner's claim (Pet. 12, 18-21, 23) is that the court of appeals departed from its own precedents in sustaining these evidentiary rulings. These contentions warrant no further review.

a. In response to cross-examination of one of the DEA agents emphasizing the informant's failure to secure a sample of the heroin prior to advancing the payment of $9,000, the prosecution asked the agent on redirect why he had not directed the informant to secure such a sample. The agent testified that the informant and Mirabile "had done prior business before" (Tr. 417). Petitioner's counsel objected to the exchange on hearsay grounds, but did not argue that this was impermissible "similar acts" evidence or seek a limiting instruction. See Fed. R. Evid. 103(a)(1). Even assuming that petitioner had preserved all the objections he now advances, there was no error in admission of the agent's testimony, because it was a proper response to the line of examination employed by petitioner. Moreover, contrary to petitioner's assertion (Pet. 19), the disputed testimony does not, on its face, report an out-of-court declaration by the informant; petitioner's claim (Pet. 22) that the agent's testimony was hearsay is thus unfounded. Moreover, even if the agent's testimony could be understood to imply that the informant had told him of prior dealings with petitioner, the hearsay objection must fail because, wholly apart from its truth value, the implicit declaration was relevant to explain the agent's conduct,

which had been the subject of cross-examination. Cf. *United States* v. *Abel*, No. 83-935 (Dec. 10, 1984), slip op. 10. Absent any request for a limiting instruction in this regard, petitioner's present claim is untenable.

b. Petitioner claims (Pet. 22-24) that his notebooks recording drug transactions related to matters outside the scope of the conspiracy charged and that they were inadmissible as similar acts evidence. Again petitioner's claim is that the unpublished judgment order of the court of appeals is inconsistent with recent Second Circuit precedent.

The court of appeals held that the diaries reflected petitioner's intent and state of mind, and that like other tools of the drug trade found at petitioner's co-defendant's apartment, they tended to show the existence of the charged conspiracy (Pet. App. 2a). The court of appeals rejected petitioner's characterization of the notebooks as hearsay, noting that their evidentiary value did not depend upon the truth of entries contained in them, but upon the very presence of a ledger of this kind, compiled by petitioner, along with other drug paraphernalia, in his co-defendant's apartment. The decision of the court of appeals — the rationale of which is ignored by petitioner — is clearly correct. Indeed, because the diaries effectively linked petitioner and his co-defendant in drug trafficking they are not merely similar act evidence. In any event, to the extent that petitioner may complain that the notebooks were admitted as part of the government's case-in-chief, rather than after the close of the defense case (cf. Pet. 21), the objection is frivolous in the setting of this case because the claim that petitioner did not intend to distribute heroin was the centerpiece of petitioner's defense. As the court of appeals observed (Pet. App. 2a), any error here was harmless

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

DOJ-1984-12